

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

10-14-77 77-5013

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
In the Matter of
THE BOHACK CORPORATION,
Debtor.

-----x
THE BOHACK CORPORATION,
Plaintiff,

-against-

TRUCK DRIVERS LOCAL UNION NO. 807,
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, et al.,

Defendants.
-----x

BRIEF OF THE BOHACK CORPORATION

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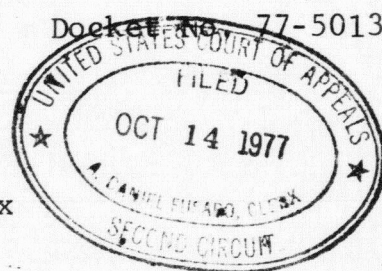


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PRELIMINARY STATEMENT

This is an appeal from an order of the United States District Court for the Eastern District of New York, (Mishler, J.) dated April 21, 1977, affirming in part and reversing in part two orders of Bankruptcy Judge Parente, dated May 19, 1976 and October 21, 1976 which resulted from hearings directed by the Second Circuit Court of Appeals on August 9, 1976. Appellant, Local 807 (hereinafter referred to as "807") appeals from the affirmance of the order of Judge Parente dated May 19, 1976 which granted the application of The Bohack Corporation (hereinafter referred to as "Bohack") made July 18, 1975, to reject the collective bargaining agreement which had previously existed between Bohack and 807, but which had expired by its own terms on March 31, 1976, two and one half months prior to the order granting the application of the debtor to reject the contract.

Both parties appeal in part from the affirmance in part and reversal in part of the order of Judge Parente, dated October 21, 1976, directing arbitration of certain issues by Bohack and 807. That order was signed upon Bohack's motion for reargument of the hearing on arbi-

tration directed by the Second Circuit Court of Appeals, which resulted in an order of October 15, 1976 directing "arbitration in accordance with the procedure set forth in Section 26 of the Bankruptcy Act to determine if [Bohack] breached said collective bargaining agreement, and to render a finding on damages if necessary".

In adhering to his prior decision granting arbitration, Judge Parente signed the October 21st order limiting and directing arbitration as to the following specific issues:

(a) The extent of damages that could be recovered by discharged employees upon the rejection of the agreement;

(b) The amount of extent of pension, health, insurance, welfare, vacation benefits and the value of seniority of each employee affected by said rejection;

(c) Mitigation of damages by reason of the subsequent employment of each employee of 807, or receipt of unemployment insurance by said employee;

(d) Whether or not there should be specific enforcement of the ~~rejected~~ agreement by reinstatement of the employees.

The October 21st order further provided that all

the issues were subject to the further order of the Bankruptcy Court as to the status, amount and validity of the arbitrators' awards, and that the arbitrator shall proceed in accordance with the procedure set forth in Section 26 of the Bankruptcy Act.

Both Bohack and 807 appealed from the orders of October 15, 1976; and the superseding order of October 21, 1976; Bohack appealing on the grounds that there should be no arbitration at all if, in fact, the rejection was appropriate. It is our position that the order of October 15, 1976 was rendered a nullity inasmuch as the October 21st order was the result of reargument of the application which caused entry of the October 15th order.

On November 19, 1976, Judge Parente amended the arbitration orders and provided for a stay of arbitration pending this appeal request of 807, which was agreed to by Bohack.

The Second Circuit had remanded three specific issues for determination by Judge Parente on August 9, 1976:

"(1) whether to affirm the contract,

or whether the debtor has so conformed to the contract as to make it binding. See In Re Public Ledger, Inc., 161 F. 2d 762, 767 (3rd Cir. 1947), cited with approval in REA Express, Inc., supra, 523 F. 2d at 170; (2) whether to grant the debtor's petition to reject the agreement as onerous, adhering to our admonition in Kevin Steel to 'move cautiously in allowing rejection of a collective bargaining agreement,' 519 F.2d at 707; and (3) whether to order arbitration under its terms in any event, and on what issues."

ISSUES PRESENTED

1. Was the order of May 19, 1976, granting Bohack's application to reject the executory contract properly sustained by the evidence presented on the hearing of the issue of rejection?

2. Did the Bankruptcy Judge commit clear error in permitting the rejection upon the evidence presented to him?

3. Was the executory contract that was rejected onerous and burdensome, and if so, would a direction to assume the contract, constitute an absolute impairment of Bohack's ability to rehabilitate itself in the Chapter XI proceeding.

4. Did Bohack expressly or impliedly assume the contract which it rejected?

5. Is 807 entitled to arbitration of alleged breaches of an agreement that has been rejected?

6. Did 807 waive arbitration by filing a claim in the Bankruptcy Court for the damages allegedly due as the result of Bohack's alleged breach of the agreement?

7. Assuming arguendo that certain issues remain to be arbitrated, may the Bankruptcy Judge set the procedure for the conduct of the arbitration pursuant to the Bankruptcy Act, specify the issues for the arbitrator and, in any event, is any award rendered by an arbitrator subject to the review of the Bankruptcy Judge?

STATEMENT OF FACTS

On December 16, 1974, (a) Bohack began to

terminate its operations at its warehouse at Bohack Square. Some of 807's members were discharged and 807 filed a grievance with the New York City Joint Local Grievance Committee in December and at that time the committee found the question was a jurisdictional dispute between 807 and another union whose drivers were delivering merchandise to Bohack stores from another supplier. Thereafter, however, that committee, on May 16, 1975, entered an award favorable to the union in effect prohibiting Bohack from receiving merchandise from other suppliers.

On May 27, 1975, 807 instituted a suit in State Court to confirm the grievance award, which suit was removed to this Court. On July 18, 1975 Bohack moved for rejection of the contract under Section 313 of the Bankruptcy Act.

On November 19, 1975 the District Court found that the arbitration award in favor of 807 was invalid as the arbitration procedure had not been approved by the Bankruptcy Court. The consolidated appeal from the arbitration award and the hearing on the granting of a preliminary injunction against picketing by 807 were decided by this Court on August 9, 1976 in the opinion referred to above.

On July 30, 1974, (b) Bohack had filed its original petition pursuant to Chapter XI of the Bankruptcy Act. At the time of filing, Bohack had operated approximately 140 retail supermarkets in Brooklyn, Queens and Long Island, together with its warehouse and distribution facilities at Metropolitan Avenue in Brooklyn, New York (the "Terminal").

Local 807 represented all of the truck drivers employed by Bohack for over thirty years prior to the Chapter XI proceeding. These drivers made all of the deliveries of meat, produce, groceries, dairy, delicatessen and bakery from the various warehouses at the Bohack Square Terminal to Bohack's retail supermarkets. The tractors and trailers used by these drivers were owned by a subsidiary of Bohack. The only source of business for Truck Fleets, the subsidiary, has been the Bohack operation.

807 drivers were laid off in various stages. On December 16, 1974 sixty drivers were laid off as a result of the closing of one of Bohack's warehouses. In January of 1975, additional drivers were laid off and in July of 1975 when Bohack terminated all its warehouse operations,

the remaining thirty-two drivers were discharged. On July 18, 1975, the date of the last lay-off, Bohack moved to reject the contract.

The rejection hearing was held in two parts, on November 17, 1975, and after an extended period of discovery by 807, on May 18, 1976. Joseph Binder, at the time of the November, 1975 hearing, was executive vice-president of Bohack, having been its president prior to the filing of the Chapter XI petition. (Unless otherwise indicated, all references to Binder's testimony in this Statement of Facts refer to the transcript of the November 17, 1975 hearing).

In January of 1974, Bohack had approximately 140 stores in operation, and just prior to the filing of the Chapter XI petition in July of 1974 there were approximately 125 stores in operation (176a). At one time in 1973 Bohack had over 200 stores. Those stores were supplied basically by the warehouses located at the terminal. There was a grocery warehouse, meat warehouse, dairy warehouse, produce warehouse and delicatessen commissary (177a-178a). 807 drivers had delivered merchandise to the stores in a fleet of trucks that was owned by Truck Fleets of New York, Inc., a wholly owned subsidiary of Bohack (178a). Approximately fifty

of the 37 acres of terminal property was used for Bohack's warehouse and distribution operation, and Bohack paid approximately one and one half million dollars for the carrying charges, maintenance and taxes on that portion of the terminal (179a-180a).

At the time the Chapter XI petition was filed, Manufacturers Hanover Trust Company had a lien on all of the property of Bohack, including inventory (180a). Shortly after the filing of the petition, the bank released its lien on inventory for the purpose of inducing merchandisers to ship to Bohack's warehouse with the security of a letter of credit at Manufacturers, on a two to one shipment to security ratio (181a-182a). At that time the grocery warehouse, which compromised about 300,000 square feet, was rapidly being emptied and Bohack was attempting to get bulk loads of merchandise from all sellers to the grocery warehouse in an attempt to keep it operating (182a). Notwithstanding these efforts, suppliers were not giving Bohack credit and Bohack was essentially on a C.O.D. basis (183a).

At the direction of the Creditors' Committee Bohack started to sell stores, so that at the time of the

hearing of November 1975, the company was down to seventy-two stores (184a). The first significant closing took place in about November of 1974, 90 days after the filing of the petition, which closing reduced the volume in the warehouse to the extent that the warehouse began losing money at a rapid pace, creating a negative cash flow, and preventing Bohack from purchasing the merchandise on a C.O.D. basis that it needed to keep the sales volume up (184a-185a). At that point the Creditors' Committee mandated Bohack to dispose of the terminal (185a-186a).

As the warehouses were becoming more of a drain on the company, the Brooklyn Savings Bank, the lead bank in a consortium which held the first mortgage on the terminal, threatened foreclosure proceedings because of Bohack's default in payment of the mortgage and taxes (186a).

In December of 1974, the produce and dairy warehouse operations were closed down, and a supply agreement was entered into with Shopwell, Inc. which acted as Bohack's wholesaler for produce and dairy (187a). When it became apparent that no credit was forthcoming from grocery manufacturers, the grocery warehouse was closed down in January

of 1975, and two grocery suppliers, Filigree Foods in New Jersey and Bozzuto's, Inc. in Connecticut, were used to supply groceries (187a-188a). Prior to that time the 807 drivers had been picking up groceries from Bozzuto's, bringing them to the terminal, where other 807 drivers would then deliver the groceries to the stores. At that point the grocery warehouse was "out of stock" in the neighborhood of fifty to sixty percent of the net items and the store shelves were depleted as a result (190a).

Binder testified that in order to run a warehouse a chain must have sufficient volume to justify such operation, the costs of which are astronomical, and as Bohack closed its stores, the volume depleted to the point that Bohack, at the time of the November 1975 hearing had become a regional chain rather than a general supermarket chain (192a-193a). Prior to the filing of the petition, Bohack's volume was approximately \$300,000,000 a year. At the time of the 1975 hearing, the volume was no more than \$100,000,000 (193a).

When the first warehouses (produce and dairy) were closed, Bohack negotiated with Shopwell with respect to the

transportation of the merchandise to be purchased by Shopwell. Bohack requested that its drivers be allowed to pick up merchandise from Shopwell, but Shopwell flatly refused, indicating "they had enough problems without getting involved with another union" (194a).

The specific offer made by Binder was that the 807 drivers would go to Shopwell with Bohack equipment, have Shopwell employees load the trailers, and have the Bohack drivers take the trailers out of the Shopwell warehouse, but such offer was refused (195a).

At the time that the grocery warehouse was closed in January of 1975, the 807 drivers were picking up groceries from both Filigree and Bozzuto's. The cost of that operation was substantially higher than what it would normally cost a wholesaler to deliver directly to the store, and the use of the warehouse was becoming more and more expensive (196a-197a). As a result, the agreement with Bozzuto's was modified so that Bozzuto's drivers delivered to the terminal and the 807 drivers delivered to the stores (197a).

In April of 1975, Filigree filed its own Chapter XI petition and stopped delivering to Bohack (198a).

Bohack entered into an agreement with Krasdale, located in the Bronx, and Krasdale refused to allow the 807 drivers to pick up the merchandise as had been done with Filigree.(199a)

Bohack had no choice but to enter into the agreement with Krasdale for merchandise delivered directly to the store, because Filigree had cancelled deliveries without notice and no other supplier was available, as Associated Foods had also filed a Chapter XI proceeding at about the same time (199a). Met Foods would not ship because of its discomfort with Bohack's financial situation and there were no other suppliers to deal with. Continued lack of delivery would have resulted in the closing down of the chain as the shelves of the stores were virtually empty and volume was rapidly decreasing and customers being lost (200a-201a).

Thereafter, changes were made because of Shopwell's price structure, and various other suppliers were used. At the time of the November 1975 hearing, Bozzuto's was supplying groceries, Krasdale was supplying dairy, Hills

Supermarkets was supplying meat, produce and delicatessen and Global Frozen Foods, Inc. was supplying frozen foods. Manufacturers Hanover Trust Co., in an effort to support Bohack's attempts at rehabilitation, reduced its inventory lien and issued Letters of Credit in the amount of \$1,500,000 which were given as security for the delivery from those companies (204a).

Subsequent to the commencement of the foreclosure proceedings on the terminal by the Brooklyn Savings Bank, corporate headquarters was moved to space over one of the Bohack stores in Little Neck, all warehouses were closed down and Bohack totally vacated the terminal except for some maintenance equipment and vehicles (205a).

Prior to the time of the filing of the petition Bohack, through Truck Fleets of New York, owned 236 pieces of trucking equipment (205a). At the time of the November, 1975 hearing, 64 pieces of equipment were being rented to Hills for the purpose of delivering produce, meat and delicatessen to Bohack stores by Hills, and 79 pieces were up for auction (206a). The others had been disposed of.

The rental payment on the trucks leased to Hills

was the amount necessary for Bohack to pay off the notes on which Bohack was the guarantor to the manufacturers of the equipment (207a). At the time of the change-over to Hills, Mr. Binder asked Hills to use Bohack drivers to make the deliveries but was told by Hills that they had their own union problems and they would not allow Bohack drivers to make the deliveries (208a-209a). Bohack introduced exhibits at the November 1975 hearing (461a-463a) which tabulated the proposed savings by the elimination of the trucking and warehouse operations (216a-222a) which would result from the elimination of the contract directly, there would be an additional savings of between \$700,000.00 to \$1,000,000.00 that was currently being lost by the operation of the terminal by Bohack (223a-229a) so that the total anticipated yearly savings by closing down the warehouse and trucking operation would be approximately \$2,000,000 (229a). Mr. Binder specifically testified that the warehouse and trucking operation was one operation that could not be separated (227a). The requests to the new suppliers to separate their operations so that the 807 drivers would be able to deliver the merchandise to the Bohack stores

were rejected by the suppliers (227a).

Mr. Binder further testified that a Plan of Arrangement was feasible but only if Bohack could operate as a retail chain, and buy from wholesalers operating by direct delivery to the stores; and that no Plan of Arrangement could be put together if Bohack were required to continue the warehouse and trucking operation (236a-237a).

Bohack was having severe financial difficulties because, apart from other inherent Chapter XI losses, it was not able to purchase the \$2,500,000.00 of merchandise per week it had to have in order to maintain its then current weekly sales volume of \$3,200,000.00 (232a).

The hearing on whether to submit any controversy to arbitration was held on September 28, 1976 and was in the form of oral argument by counsel for the parties. Thus, there was no testimony taken and Judge Parente's order of arbitration was made pursuant to what he perceived to be the direction of the Second Court of Appeals.

POINT I

ALL OF THE TESTIMONY PRESENTED AT THE HEARING ON WHETHER TO PERMIT BOHACK TO REJECT THE COLLECTIVE BARGAINING PROCEEDING ESTABLISHED THAT BOHACK WAS ENTITLED TO THE REJECTION UNDER THE SECOND CIRCUIT COURT OF APPEALS' TEACHING IN LOCAL 455 v. KEVIN STEEL PRODUCTS, INC. and TRUCK DRIVERS LOCAL 807 v. THE BOHACK CORPORATION

This Court has recognized the right of a debtor-in-possession to reject an executory contract even where that contract is a collective bargaining agreement, in Local 455 v. Kevin Steel Products, Inc., 519 F.2d 698 (2d Cir.,1975); Brotherhood of Railway Airline and Steamship Clerks v. R.E.A. Express, Inc., 523 F.2d 164 (2d Cir.,1975), cert. den. Dec. 9, 1975, and reaffirmed that holding in the August 9, 1976 opinion in Local 807 v. Bohack, 541 F.2d 312 which resulted in the remand to the Bankruptcy Court for a hearing on Bohack's right to reject the 807 contract.

We have set forth in our Statement of Facts the testimony pointing to the need to reject the contract as a simple matter of survival for Bohack. It should be noted that except for some testimony developed on cross-examination to the effect that 807's labor contract was not significantly different in cost from the contracts

of the unions that drove the trucks for the various wholesalers Bohack supplied, and the fact that Bohack complied with most of the economic terms of the agreement prior to the rejection, that testimony was all of the testimony presented at the hearing regarding the burden imposed on Bohack by the agreement's existence.

In short, all of Mr. Binder's testimony stands unrefuted and, since the court judged the testimony to be credible as an accurate picture of Bohack's situation since the filing of the Chapter XI petition, it was properly believed by the Bankruptcy Judge. Margolis v. Nazareth Fair Grounds & Farmers Market, Inc., 249 F.2d 221 (2d Cir., 1957); Morris Plan Industrial Bank v. Henderson, 131 F.2d 975 (2d Cir., 1942); In re Nemrov, 134 F. Supp. 678 (S.D.N.Y., 1955); Securities and Exchange Com'n v. S.H. Salmon & Co., Inc., 375 F. Supp. 867 (S.D.N.Y., 1974). The present status of Bohack's position reflects the accuracy of the testimony at the time it was given. 807 presented no witnesses, did not contradict the testimony given by Mr. Binder that he tried to make arrangements with the various wholesalers, whereby 807 drivers could be retained to deliver merchandise

to the Bohack stores, and did not contradict the testimony which established that apart from all other costs of actual trucking and warehousing, the closing down of the terminal would result in a savings of over \$1,000,000.00 a year to Bohack, by elimination of the real estate operation covering the entire terminal.

It is, thus, respectfully submitted that under no circumstances can Judge Parente's ruling on the rejection application be reversed. Designer's Guild, Local 30 v. Hers Apparel Industries, Inc., 4 C.B.C.177, 184, (S.D.N.Y., 1975). Kevin Steel set down the guidelines for a proper rejection of a collective bargaining agreement as follows: (519 F.2d at p. 70):

"The decision to allow rejection should not be based solely on whether it will improve the financial status of the debtor. Such a narrow approach totally ignores the policies of the Labor Act and makes no attempt to accommodate to them. In In re Overseas National Airways, supra, the court emphasized

that a bankrupt court should permit rejection of a collective bargaining agreement 'only after thorough scrutiny, and a careful balancing of the equities on both sides, for, in relieving a debtor from its obligations under a collective bargaining agreement, it may be depriving the employees affected of their seniority, welfare and pension rights, as well as other valuable benefits which are incapable of forming the basis of a provable claim for money damages. That would leave the employees without compensation for their losses, at the same time enabling the debtor at the expense of the employees, to consummate what may be a more favorable plan of arrangement with its other creditors.' 238 F. Supp. at 361-62. This approach is a sound one and the bankruptcy court must move cautiously in allowing rejection of a collective

bargaining agreement." (emphasis added).

Thus, we submit this Court has said not that a debtor may reject a collective bargaining agreement only under the most extraordinary circumstances, but rather that a careful review of the equities and necessity for the rejection is required in the exercise of the Bankruptcy Judge's discretion. Moreover, in Kevin Steel, there was no showing before the District Court of a viable Plan of Arrangement that could be impaired by assumption of the contract.

Here, with respect to the union's putative argument as to hardship, the evidence brought out only that which is perfectly obvious: that the employees who were discharged have suffered the loss of substantial wages and benefits. All of the testimony, however, with respect to the reasons for the rejection establish that there was no other course of action for Bohack but the yielding of its warehouse and trucking operation with the obvious ancillary effect, the elimination of the truck drivers' jobs. We will discuss the testimony and the conclusions to be drawn therefrom in Point III, infra, but reiterate at this

time that there could be no other decision made by Judge Parente, because the testimony compelling rejection of the agreement as an appropriate measure of relief to be granted by the court was the only testimony before the Judge.

POINT II

ON THE EVIDENCE BEFORE THE BANKRUPTCY COURT, ITS DETERMINATION TO ALLOW
REJECTION WAS NOT CLEARLY ERRONEOUS.

As indicated above, all of the testimony of Mr. Binder shows the absolute necessity of permitting the rejection as the only possible chance of rehabilitation for Bohack. There is nothing in the record to indicate that the testimony was not credible, and, indeed, the Plan of Arrangement and the testimony adduced before Judge Parente at another hearing, on the issue of permitting a settlement of the claim of Manufacturers Hanover Trust Company with respect to its second mortgage on the terminal, established beyond a doubt, the necessity of the disposition of the terminal as the only basis for a feasible Plan of Arrangement. It is a well established rule of law that the Bankruptcy

Judge's findings cannot be overturned unless clearly erroneous. Bankruptcy Act, Section 2a(10) (11 U.S. C. 11); Bankruptcy Rule 810; Kolesinski v. Mashey, 127 F. 2d 528 (2d Cir., 1942); Morris Plan Industrial Bank, supra; In re Ira Haupt & Co., 289 F. Supp. 966 (S.D.N.Y., 1957); In the Matter of Scientific Resources Corporation, I Bankr. Ct. Dec. 689 (E.D. Pa., 1975); 2A Collier on Bankruptcy, 14th Ed. ¶39.28; 13 Collier, supra at ¶810.01 et seq. As the District Court said in Designers Guild Local 30 v. Hers Apparel Industries, Inc., supra,

"Judge Babitt's findings cannot be overturned unless they are found to be 'clearly erroneous'. Bankruptcy Rule 810.

In a case of this type it is not sufficient that the court, if it were the trier of the facts, might have reached a different conclusion. The 'clearly erroneous' rule applies not only to

basic facts but also to differing inferences which may be drawn from the facts'. In re Cichanowicz, 247 F. 975, 977 (E.D.N.Y., Aff'd 353 Fed. 2d 538 (Sec. Cir., 1965)). Judge Babitt found the two contracts to be onerous and burdensome. I must accept those findings unless I have a 'firm conviction' that a mistake has been made. I do not believe that such a mistake has been made".

Again, we state that since there was no contradiction by 807 of the testimony of Bohack's officer with respect to the circumstances and necessity of the rejection of the contract, a contrary finding would have been clearly erroneous. Under these circumstances, Judge Parente's findings, as affirmed by the District Court, must be sustained.

POINT III

THE COLLECTIVE BARGAINING AGREEMENT
WAS PROPERLY REJECTED AS ONEROUS
AND BURDENSOME.

Mr. Binder's testimony established clearly that in order for Bohack to survive it had to cut the size of the chain and had to eliminate the warehouse and trucking operation. A retail supermarket chain cannot sustain a warehousing and trucking operation unless it has sufficient volume to cover the overhead of the operation. The Bohack warehouse had at one time accommodated 200 retail outlets. At the time of the filing of the petition there were approximately 125 to 140 stores in operation. At the time of the November 1975 hearing there were only 72 stores in operation. Mr. Binder testified that the warehouse and trucking operation (which cannot be severed as 807's counsel suggests) was a losing proposition when there were 140 stores. When the chain was down to 72 stores, the continuation of the warehouse and trucking operation constituted a virtual catastrophe for Bohack, and its continuation

would have meant the total collapse of the business.

The union introduced no evidence to show how continuation of the rejected agreement would enable Bohack to survive. It introduced no evidence to contradict the necessity of closing down the warehouse and, moreover, it introduced no probative evidence to support its contentions that the warehouse and trucking operation could somehow be continued. The reason no such evidence was presented is that no such evidence exists. If no warehouse existed, then there was no place from which Bohack drivers could pick up merchandise in order to deliver it to the stores; the only possible use for 807 drivers would be if the suppliers of Bohack would consent to using 807 drivers to deliver merchandise to Bohack stores.

Binder testified that the request was made of each of the suppliers and that each flatly refused the request. 807 introduced no testimony to refute the attempts to keep 807 drivers on the job, it introduced no testimony of any efforts the union itself made in an attempt to deal with the other suppliers.

Thus, Bohack obviously was placed in an impossible situation with respect to the collective bargaining agreement. Its cash flow position was very bad and would not allow it to keep the drivers on without any work for them to perform. It no longer had work for them to perform because the warehouse had to be closed down, and the suppliers who took over the job of providing Bohack's store requirements would not allow the use of 807 drivers. Thus, there was not present a question of merely improving Bohack's financial position by rejecting the contract, a situation proscribed by Kevin Steel, but a question of whether Bohack could survive.

The testimony also established without contradiction that not only was the terminal to be shut down because of the cash flow drain caused by the unprofitable warehouse and trucking operation, but that the carrying charges of Bohack for the terminal as a whole and the portion it actually used amounted to almost \$1,500,000.00 per year.

Bohack was in default with respect to both real estate taxes and the first mortgage on the terminal during the entire period of time subsequent to the filing of the Chapter XI petition. In June of 1975 Brooklyn Savings

Bank commenced a foreclosure action which was stayed by Judge Parente on application of Bohack in order to give the parties some time to work out a potential settlement. The total amount of money for which Bohack is in default by virtue of the acceleration provision of the mortgage is over \$10,000,000.00. Subsequent to the staying of the foreclosure action, an agreement was worked out by which Bohack or its subsidiary could retain title by generating \$300,000.00 a year in income to be paid to Brooklyn Savings Bank as interest. That arrangement could not be carried out if Bohack was left sitting with an unprofitable warehouse operation covering more than 50% of the terminal. Moreover, the proposed Plan of Arrangement provides for title to pass from Bohack to another corporation and an exculpation of Bohack from liability under the mortgage.

The testimony presented to Judge Parente established not only the direct onerous cost of the collective bargaining agreement between Bohack and 807, but the absolute necessity for the closing down of the terminal by the direction of the Creditors' Committee and by the pure economics of the situation. Thus, the rejection of the

agreement cannot be ascribed to improper motive or to a mere desire to improve Bohak's financial position. Mr. Binder testified, and no evidence to the contrary was presented, that no Plan of Arrangement could possibly be worked out unless the warehouse and trucking operation was discontinued entirely.

We do not minimize the economic impact of the rejection on 807's members, but this was not a case of making a better Plan for other creditors; it was a case of hopefully permitting the survival of the company so that the 2,000 other employees can retain their jobs. The Second Circuit has said that the question of rejection of a collective bargaining agreement should be reviewed closely and we submit that Judge Parente, in reviewing the testimony concentrated on the single most important issue involved: whether the company could be rehabilitated, in considering whether or not to reject the contract.

Moreover, this is not a case where the employer attempted to mislead the union into thinking that there was no danger to continued employment of its members. At each stage of consolidation, drivers were laid off, and, indeed, 807's first complaint to the Joint Local Board of the

Teamsters related to the first stage of layoffs. cf, Brotherhood of Railway, Airline and Steamship Clerks v. R.E.A. Express, Inc., 523 F.2d 164 (2nd Cir., 1975) at p.171.

POINT IV

AS A MATTER OF LAW, BOHACK DID NOT
ASSUME, EITHER EXPRESSLY OR IMPLIEDLY
THE AGREEMENT THAT WAS REJECTED.

Recognizing the right of Bohack to reject executory contracts, Local 807 argues that Bohack either expressly assumed or implicitly adopted the terms of the rejected collective bargaining agreement. We respectfully submit that, as a matter of law, no such assumption or adoption is possible without the explicit waiver of the right to reject in a Chapter XI proceeding.

The union's claim is essentially grounded in the holding of In re Public Ledger, Inc., 161 F.2d 762 (3rd Cir., 1947) which was a Chapter X case and dealt with the implied assumption of the contract by the trustee in bankruptcy. The Court of Appeals noted there that the Bankruptcy Court clearly contemplated a quick reorganization and "continuance of the labor contract as the basis for the continued service of the employees", and thereby authorized the trustees to assume the contract (161 F.2d at 767).

In a Chapter XI proceeding, the debtor-in-possession may reject an executory contract under Section 313(1) of the Bankruptcy Act, Rule XI-53, or pursuant to Section 357(2), in the Plan of Arrangement itself. (11 U.S.C. 711 and 757).

It is our position that the inescapable conclusion to be drawn from that statutory scheme is that unless there is an explicit assumption of the contract or such action that would mislead the other party to the contract, a debtor-in-possession may not be charged with the assumption of the contract under the circumstances presented here. The Bohack Corporation v. Staltac Associates, et al. 2 Bankr. Ct. Dec. 396, aff'd E.D.N.Y. (Mishler, J.) August 2, 1976; Smith v. Hill, 317 F.2d 539 (9th Cir., 1963); 8 Collier; supra ¶313(1) [6] at 204.

On one hand this union argues most strenuously that Bohack's actions since the filing of the original petition, pursuant to Chapter XI, constitute an express or implied assumption of the agreement; on the other hand it argues that Bohack's actions with respect to the agreement, since the filing of the petition, are the basis of a claim for

breach of that contract subject to an arbitration award by an appropriate panel as set forth in the collective bargaining agreement. It is respectfully submitted that 807 cannot interpret the same facts so as to reach opposite conclusions simultaneously.

The very fact that a Plan of Arrangement, pursuant to Section 357(2) of the Bankruptcy Act, may provide for the rejection of any executory contract, is, we submit, ample grounds for holding that a debtor-in-possession has almost unlimited discretion as to when it may reject such a contract. See The Bohack Corporation v. Stalac Associates, et al, supra. There is an express distinction between a Chapter XI proceeding and straight bankruptcies under the Bankruptcy Act, in that a trustee in bankruptcy is expressly allowed sixty (60) days in which to either affirm or reject a contract unless that time is extended by the court under Section 70b of the Bankruptcy Act, and there is no time limit set in which a debtor-in-possession may take similar action. As indicated above, the two sections dealing with Chapter XI proceedings give a debtor-in-possession much more latitude in time to decide when in fact to reject the con-

tract. In fact, under the new provisions dealing with Chapter X cases, the trustee has the same rights as a debtor in a Chapter XI proceeding to reject executory contracts in a Plan of Reorganization. Bankruptcy Act, §216, 11 U.S.C. 616. The facts in this case clearly indicate that there never was an assumption of the contract.

The Chapter XI proceeding has been pending since July 30, 1974, and during that period of time there have been constantly changing circumstances which have made it appropriate for Bohack to seek rejection of contracts under which it previously operated. Obviously, one of the most important circumstances governing collective bargaining agreements is the nature of the Bohack operation as a supermarket chain.

As indicated in the Statement of Facts and Points I and III above, both the size and scope of Bohack's operation were radically altered during the period of July 30, 1974 to July 18, 1975. During that period, the retail outlets of Bohack were reduced from approximately 140 to approximately 70. The warehouse and trucking operation which revolved around the terminal at Bohack Square were totally

terminated, by virtue of Bohack's moving out of Bohack square.

Each time a portion of the warehouse and trucking operation was discontinued, Bohack discharged 807 drivers. It at all times attempted to retain the jobs of 807 drivers by seeking accommodations to that effect with the various suppliers, but was unsuccessful in each instance. Of course, during that period of time it continued to pay each driver who remained in Bohack's employ the wages and fringe benefits he was making according to the terms of the collective bargaining agreement.

The basic claim of 807 in this case is that Bohack breached the agreement by discharging employees and by allegedly subcontracting out the work that the 807 drivers previously did. There can be no doubt that, in fact, Bohack did discharge truck drivers, as their services were no longer needed, and moreover (without conceding the legal effect thereof), the work those drivers previously did: i.e., delivery to Bohack stores, was subsequently done by drivers belonging to unions that represented drivers at the various suppliers of Bohack. It is respectfully submitted

that the actions complained of by 807 are precisely those actions which are inconsistent with an express assumption of a contract, and with the concept of implicit adoption of the contract. We fail to see any merit in the argument that the justified reduction of the numbers of drivers, (allegedly a breach of the contract) while paying applicable wages and benefits to remaining drivers, constituted an adoption of the contract.

Section 357(2) of the Bankruptcy Act, in allowing rejection of executory contracts in a Plan of Arrangement contemplates the precise situation present here, where the debtor is a large corporation whose rehabilitation proceedings take an extensive period of time, and whose actions are subject to changing circumstances. Bohack v. Staltac, *supra* (Mishler, J.); In re Miracle Mart, Inc., 396 F.2d (2d Cir., 1968). There is no time limit contained in Sections 313(1) and 357(2) of the Act, and, indeed, the time within which a debtor may file an amended Plan of Arrangement is subject only to the equity jurisdiction of the Bankruptcy Court.

The scope and size of Bohack's operations have undergone radical alteration. The number of employees who work for the company at the time of the filing of the

petition was drastically reduced by the reduction in operations. It was not a one-stage reduction but a paring down of operations at successive stages. Sixty drivers were discharged in December, 1974, more were laid off in January and May of 1975, until only 32 drivers remained in July, 1975, when all warehouse operations were discontinued. The Bankruptcy Court, as a court of equity, properly found that Bohack did not assume or adopt the contract by retaining as many of the 807 drivers as it could during each stage of the reduction in operations. Brotherhood of Railroad, Airline and Steamship Clerks v. R.E.A. Express, Inc., supra, 523 F.2d 171. Under the foregoing circumstances, it is respectfully submitted that Judge Parente's decision allowing the rejection was correct in all respects.

POINT V

THE REJECTION OF THE CONTRACT
MOOTED THE ARBITRATION ISSUE AND
NO ARBITRATION SHOULD BE GRANTED.

In its remand to the Bankruptcy Court, the Second Circuit Court of Appeals directed the Bankruptcy Judge to determine "whether to order arbitration under its (the agreement's) terms in any event, and on what issues". It held "upon affirmance of the contract, the agreement to arbitrate survives the expiration of the contract as to disputes arising during the term of the contract", but that a rejection was effective as of the date of the filing of the Chapter XI petition. In footnote 15 of its opinion, the court said "Hence, the provisions for arbitration could continue to support an order of the Bankruptcy Judge that the parties arbitrate their dispute, though the priority and status of any arbitration awarded would be a matter of bankruptcy law for the Bankruptcy Court to decide".

It is submitted that the Court of Appeals merely directed the Bankruptcy Judge to determine whether there were arbitrable issues, and did not define any issues or, in

fact, state that such issues existed. However, Judge Parente perceived the remand as a direction by the Second Circuit to allow the arbitration and to subject any award arising therefrom to the scrutiny of the Bankruptcy Court. The ambiguity of the Circuit Court's opinion has, we submit, been resolved by its recent decision in Allegaert v. Perot, et al. 548 F.2d 432 (2d Cir.,1977).

It is respectfully submitted that, in fact, there are no issues that should be arbitrated. It is our position that if the contract was properly rejected, in that event any claims for damages or any administrative claims that the 807 drivers might have would be subject to the Bankruptcy Court's application of Section 64 of the Bankruptcy Act, which determines the priority of claims. If the arbitrator decided that there was a breach of contract, it would vitiate the findings of Judge Parente that there was a proper rejection. In Kevin Steel, supra, R.E.A. Express, Inc., supra and Local 807 v. Bohack, supra the Second Circuit addressed the question of policy conflict that exists between the Bankruptcy Act and the National Labor

Relations Act. In this case, we submit that public policy considerations underlying the Bankruptcy Act must prevail on the issue of whether or not to arbitrate a question that should ultimately be determined by the Bankruptcy Court. See American Safety Equipment Corp. v. J.P. McGuire & Co., 391 F.2d 821 (2d Cir., 1968); Wilko v. Swan, 346 U.S. 427 (1953); cf. L.O. Koven & Brother, Inc. v. Local U. No. 5767, United Steelworkers, 381 F.2d 196 (3d Cir., 1967).

As the Third Circuit said in Koven, supra, at p. 205:

"In summary, we hold that questions involving an interpretation of the Bankruptcy Act should be decided by the court, while questions involving an interpretation of the collective bargaining agreement should be feasible be decided by the arbitrator, unless they involve special bankruptcy interests. If such interests are present, then the proper forum should be dictated by the needs of the particular case, and this is a matter best left with the discretion

of the trial court. We find that no such interests are involved in the release issue, and hold therefore that it is arbitrable."

In this case, special bankruptcy interests are obviously present, and there is a direct potential conflict involved in an arbitrator's finding that the contract was "breached" when the Bankruptcy Judge has already found it was properly rejected.

As the Second Circuit recognized throughout its opinion in Local 807, supra, a rejection is effective as of the date of the filing of the Chapter XI petition. There is ample opportunity in the Bankruptcy Court for the 807 drivers to be heard on the issue of their alleged damages, which arises from their filing of claim number 2288, alleging a priority administration claim based on the alleged breach of contract. The Second Circuit recognized implicitly in the Kevin Steel case that the rejection of an agreement would, in effect, moot many issues as to alleged breaches during the period of time after the filing of the petition. Thus, in Kevin Steel, the National Labor Relations Board

had found violations of the National Labor Relations Act and had required the company to execute a contract submitted by the union and give it retroactive effect, as well as requiring the company to "make the employees whole for any loss of wages or other benefits suffered as a result of its failure to sign the agreement as to offer reinstatement to the unlawfully discharged employees". There the N.L.R.B. conceded that the effect of the enforcement of the Board's order remedying the violations was dependent upon the outcome of the company's application to reject the agreement (519 F.2d at p. 701).

It is respectfully submitted that here, as in that case, the rejection properly moots any potential award of specific performance made by an arbitrator. Thus, where specific performance of a rejected contract is impossible, and Section 64 of the Bankruptcy Act provides the appropriate means for determining any question of damages alleged by the union, the rejection of the contract eliminates any need or desirability for an arbitration hearing, in which the ultimate questions decided must be reviewed by the Bankruptcy Court in any event. There is no question here of working

conditions or shop practices that existed during the time the contract was in effect, but rather a potential claim for damages ascertainable as a matter of law, not by grievance procedures. In re Muskegon Motor Specialties Company, 313 F.2d 841 (6th Cir., 1963); Johnson v. England, 356 F.2d 44 (9th Circuit., 1966).

Even on motion for reargument of the arbitration order, 807's counsel acknowledged that a proper rejection effectively determined the status of the administration claim filed by 807 based on the alleged breach of the contract.

Our analysis of the cited cases is borne out by the Second Circuit's recent decision in Allegaert v. Perot, supra where the court said: (548 F.2d at p. 437)

"We accept without reluctance the federal policy favoring arbitration,' Carcich v. Rederi a/b Nordie, 389 F. 2d 692, 696 (2d Cir., 1968), reflected in the United States Arbitration Act. But such acceptance does not decide this case, which involves the equally

significant policies reflected in the securities acts and the Bankruptcy Act. In such a situation, generalities must give way to careful analysis of the different, sometimes competing, public policy interests. Thus, none of the cases stressed so heavily by appellees controls the disposition here, since each depends on its own facts. In Fallick v. Kehr, 369 F. 2d 899 (2d Cir., 1966) we allowed an arbitrator to decide in a dispute between private parties whether a debt had been discharged in a completed bankruptcy proceeding. We did so after careful consideration of all the factors involved, including Congressional lack of concern over use of a non-bankruptcy¹⁴ court forum to decide such issues . In any event, we did not hold that Kehr could force Fallick's bankruptcy trustee to arbitrate that question. Similarly,

in Tobin v. Plein, 301 F. 2d 378
(2d Cir., 1962), and in Truck Drivers
Local 807 v. Bohack Corp., 541 F.2d
312 (2d Cir., 1976), we did not force
arbitration upon an unwilling bankruptcy
trustee and the trustee was not asserting
the type of claims made here under the
securities laws and the Bankruptcy Act.
The latter is also true of Schilling v.
Canadian Foreign Steamship Co., Ltd. 190
F. Supp. 462 (S.D.N.Y. 1961)."

"Finally, since the Bankruptcy Act and
securities law claims involve so many
of the basic factual and legal issues
underlying the trustee's remaining claims,
resolution of the former may make it un-
necessary or inappropriate to proceed with
the latter in any forum. Under the cir-
cumstances, no arbitration should be
permitted at this time."

Not only is such language a clear indication

that our general statement as to the applicability of arbitration is correct, but it is a clarification and resolution of the ambiguity contained in Local 807 v. Bohack, and a clear indication that the debtor should not be compelled to arbitrate.

POINT VI

807 WAIVED ITS RIGHT TO ARBITRATE BY
SUBMITTING A CLAIM FOR DAMAGES ALLEGEDLY
DUE AS A RESULT OF THE COMPLAINT OF
BREACH OF THE COLLECTIVE BARGAINING
AGREEMENT BY BOHACK.

It is respectfully submitted that by filing its claim in the Bankruptcy Court as an administrative claim, 807 has waived its right to seek the same remedy in any other forum, and has submitted all aspects of the claim to the summary jurisdiction of the Bankruptcy Court, irrespective of any other argument concerning possible arbitration. In the Matter of Ira Haupt & Co. 289 F. Supp. (S.D.N.Y.1968).

In a case such as this, that result does not deal harshly with 807 because, as this Court recognized in footnote 15 of its opinion in Local 807 v. Bohack, any arbitration award that might have been granted would be subject to review by the Bankruptcy Court in any event, as to the priority and status of the award. And, as indicated in Point V, supra 807 has recognized that the status of the claim is effectively determined by the resolution of the question of rejection of the contract.

What 807 really seeks is a holding in a forum it considers more favorable to itself that would in some way bind the Bankruptcy Court. This is inappropriate, as we have indicated in our arguments above, because the rejection of the contract on application to the Bankruptcy Court mooted the question of whether, in fact, there was any breach of the alleged agreement.

As we indicated elsewhere in this brief, the rejection of the contract resolves the basic question that the Union seeks to arbitrate whether in fact there was a breach of the contract by the discharge of the employees and the discontinuation of the warehouse and terminal operation. Therefore, it would be totally inappropriate for 807 to submit a claim for damages to the Bankruptcy Court and at the same time present to that court a virtually conclusive finding that there was a breach of the agreement, when, in fact, the court has already decided that the rejection of the contract was proper under the circumstances. Allegaert v. Perot, supra. 807's claim, No. 2288, as set forth on the face thereof, demands adjudication by the Bankruptcy Court as an administrative claim entitled to priority, and as such a

claim, it should be tested before the Bankruptcy Judge, not in any other forum.

POINT VII

SECTION 26 AND RULE 919 OF THE BANKRUPTCY ACT GIVE THE BANKRUPTCY JUDGE THE POWER TO SET THE PROCEDURAL GUIDE LINES FOR THE CONDUCT OF ARBITRATION, AND THE FURTHER POWER TO REVIEW ANY AWARD RENDERED BY THE ARBITRATOR.

Section 26 of the Bankruptcy Act and Bankruptcy Rule 919(b), which supersedes Section 26, provide that any controversy affecting the estate may be submitted to binding arbitration upon the authorization of the Bankruptcy Judge, 11 U.S.C. 49.

Assuming arguendo that Judge Parente's direction to submit certain issues to arbitration is proper under the circumstances of this case, clearly that arbitration, including the choice of arbitrators, must be had under the supervision and control of the Bankruptcy Court and according to the Act. In re Patterson-McDonald Shipbuilding Co., 284 Fed. 277 (C.D.C. Wash., 1922) aff'd 292 Fed. 700 (9th Cir., 1923).

In its argument, 807 ignores the plain wording of this Court's opinion in Local 807 v. Bohack. After stating that the rejected contract would be of sufficient

vitality to support Judge Parente's order to arbitrate, the court went on to state "there must be judicial control over other rights and duties of the bankrupt. For now, an additional consideration has been added, the rights of the creditors. See Johnson v. England 356 F.2d 44 (9th Cir., 1966 cert. denied, 384 U.S. 961 1966)." The court also said "since the agreement has expired by its terms, the scope of any arbitration may be limited".

Moreover, in footnotes 15 and 16 of the opinion, the Court specifically indicated that "the priority and status of any arbitration award would be a matter of Bankruptcy Law for the Bankruptcy Court to decide, "and a claim for wages or other contractual benefits for the period of the contract after employment seized would arise only if the arbitrator or the court also finds that the contract was breached by the employer's actions after the petition was filed". (emphasis added).

Thus, it is respectfully submitted that the clear implication of this Court's opinion remanding the matter to the Bankruptcy Court is that any arbitration be held under the supervision and control of the Bankruptcy Court, and that any award may properly be reviewed by the

Bankruptcy Court. In re Patterson--McDonald, supra; 13 Collier, supra at ¶919.04.

We have argued above that 807 has submitted all issues to the Bankruptcy Court by the filing of a claim in this proceeding. What 807 seeks to do on this appeal, however, is to deprive the Bankruptcy Court of the right to review the issues concerning the validity and status of any award granted by an arbitrator.

807 also argues that the grievance procedure contained in the rejected collective bargaining agreement must be utilized, rather than the procedure set down in Section 26 of the Bankruptcy Act as ordered by Judge Parente in his order of October 21, 1976.

807 cites as authority for its contention Tobin v. Plein, 301 F.2d 378 (2d Cir., 1962) and this Court's opinion in Local 807 v. The Bohack Corporation. However, in Tobin v. Plein there was not present the case of a rejection of the agreement by the trustee in bankruptcy, but rather an explicit attempt to affirm the contract and to proceed under its terms. At the time the Second Circuit rendered its opinion in Local 807 v. Bohack in August

of 1976, it did not know that there had been a rejection of the contract in May of 1976 by the Bankruptcy Court. Although the Circuit Court's opinion stated that "the contract is of sufficient vitality to support" an order of arbitration by the Bankruptcy Judge, it stated also that while "Tobin v. Plein is not a holding precisely on point, the clear implication is that a contractual agreement to arbitrate survives the filing of a petition in bankruptcy". We suggest that the question of whether there has been a rejection is controlling on the extent of the vitality of the provision for arbitration contained in the rejected agreement.

Not knowing that the application for rejection had been made, this Court had directed that the rejection question be considered first, before the arbitration question was taken up. In regard to 807's position that the contractual arbitration provisions controlled, the Court of Appeals stated the following in Local 807 v. The Bohack Corporation:

"Upon affirmance of the contract, the agreement to arbitrate survives the ex-

piration of the contract as to disputes arising during the term of the contract. See United Steelworkers of America v. Enterprise Wheel & Car Corp., supra. Rejection of the contract is deemed a breach of contract as of the time of filing of the Chapter XI petition. 8 Collier on Bankruptcy ¶3.15[7] at 206 (14 ed.1976). Even if the contract is rejected that does not necessarily mean that arbitration should not be ordered, though the issues may be different. Moreover, if the contract is rejected, the employees become creditors of the estate and may have a claim for damages against the estate; if the contract is affirmed or found to have been assumed, the employees may have a first priority claim for wages and other fringe benefits. Countryman, supra at 494". Clearly, the Court of Appeals has recognized

a rejected contract stands in completely different footing than an affirmed contract or one that has merely expired. Thus, the statutory provisions should be controlling under Bankruptcy Law rules and the Bankruptcy Judge's direction to proceed to arbitration in accordance with the Bankruptcy Rules should be allowed to stand.

The significance of the Second Circuit's recognition of the distinction between a rejected and an affirmed contract is best exemplified in the case of Johnson v. England, 356 F.2d 44 (9th Cir., 1966). In that case, the Circuit Court held that arbitration provisions of a collective bargaining agreement would be appropriately complied with in the case of a going business which had filed a petition in bankruptcy, under the theory that the responsibility for complying with an existing contract cannot be avoided by the filing of a petition in bankruptcy or for reorganization. However, once the contract has properly been rejected, as suggested by this Court in Local 807 v. Bohack, the claim becomes one for damages and the determination of the priority and status of those damages is for the Bankruptcy Court. (See Local 807 v. The Bohack Corp-

oration at page 321).

Clearly, the situation of a discontinued business and the lack of need for arbitration under a collective bargaining agreement that was once in effect is analogous to a rejected collective bargaining agreement, which was the situation here.

In Johnson v. England, the court said (356 F. 2d at pages 51-52).

"The controversy which now arises is between two groups of creditors of White House. On the one hand we have the employees and on the other we have the other general creditors such as creditors for merchandise sold. This does not present the type of grievance which is ordinarily the subject of arbitration under a collective bargaining agreement enforced pursuant to ¶301(a). Such controversies usually involve disputes between the union and the current operating employer and are generally of such character that they lend themselves most readily to solution

through arbitration. In that type of case the arbitrators ' sit and settle disputes at the plant level--disputes that require for their solution knowledge of the customs and practices of a particular factory or of a particular industry as reflected in particular agreements' United Steelworkers of America v. Enterprises, etc., Corp. 363 U.S. 103, 596, 80 S. Ct. 1358, 1360.

A decision of an arbitrator here would involve interests of parties who never consented to arbitration namely the trustee in bankruptcy and the general creditors. They ought not to be bound by the decision of an arbitrator selected by the employer in the union. The issues here are within the special competence of a bankruptcy court.

Furthermore, if appellants had their way and arbitrators were put in a position to decide, and did decide that the \$158,000

were trust funds, or that appellants should be allowed preference, such a decision would not be subject to full judicial review in any court, (see United Steelworkers of America v. Warrior & Gulf Co., 363 U.S. 574, S. Ct. 1347). That ought not to happen to these general creditors.

Appellants' claim is that the national labor policy favoring arbitration requires that a suit under §301(a) to enforce arbitration may be maintained notwithstanding the bankruptcy of the employer and the complete termination of its business, and notwithstanding the fact that the dispute concerns the allocation of corporate funds. The Supreme Court dealt with a similar claim in Nathanson v. National Labor Relations Board, 344 U.S. 25, 28, 73 S. Ct. 80, 83, 97 L. Ed. 23. There it was argued that the interest of the United States

in eradicating unfair labor practices was so great that a labor board's back pay order should be granted priority of payment against a bankrupt employer. Said the Court: 'Whether that should be done is a legislative decision.'⁹ Suffice it to say that we do not feel it to be proper for us to make what is essentially a legislative decision with respect to appellants' claim here.

The claim of the employees or of the union as creditors of White House remains unliquidated. The Bankruptcy Act provides adequate machinery for the ascertainment of the amount of the claim and for its liquidation §26 of the Act (Title 11 U.S.C. §49) provides an appropriate method of the determination of the amount of the employees' claims through arbitration. Such an arbitration concerning the amount of the claim is quite appropriate. A submission to

arbitration of the questions sought to be raised in the appellants' suit in the court below, such as the existence of a trust or of the preference of appellants' claims as against other creditors of the bankrupt, would appear to us to be inappropriate".

Once again, it must be reiterated that the limitation of issues and the judicial scrutiny relevant to any arbitration proceeding or award is mandated by the rejection of the contract. The argument that the arbitrator's award is not subject to review by the Bankruptcy Court would totally frustrate the purpose of the Bankruptcy Act and the direction by the Court of Appeals in Local 807 v. The Bohack Corporation.

To give conclusive weight to the findings of a breach of contract by an arbitrator who might be awarded specific performance of the ~~rejected~~ contract would result in a finding by an arbitrator inconsistent with the Bankruptcy Judge's findings of a proper rejection.

To suggest that the Bankruptcy Judge could do nothing but enter a judgment enforcing such award would fly in the face of logic and the Bankruptcy Act. The fact that a collective bargaining agreement is involved is of no consequence. No Bankruptcy Court could delegate to an arbitrator the right to determine a breach of this nature, which is essentially the termination of this agreement. That question is properly decided by the court on an application to reject the agreement.

CONCLUSION

That portion of Judge Mishler's order of April, 21, 1977 affirming Judge Parente's order of May 19, 1976 rejecting the collective bargaining agreement should be affirmed. That portion that affirmed the order of October 21, 1976 granting arbitration of certain limited issues should be reversed. Failing reversal, such arbitration should be had pursuant to the Bankruptcy Judge's direction

under Bankruptcy Act Rule 919(b).

Dated: New York, New York
October 14, 1977

Respectfully submitted,

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Of Counsel:

JESSE I. LEVINE
WILLIAM M. RIFKIN

STATE OF NEW YORK)

ss.:

COUNTY OF NEW YORK)

Paula Rezzonico, being duly sworn, deposes and says:

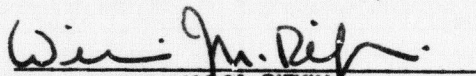
I am not a party to this action; I am over 18 years of age; I reside at 1523 Central Park Avenue, Yonkers, New York.

On October 14, 1977 I served the within Brief of The Bohack Corporation upon O'Connor, Quinlan and Mangan, attorneys for defendants-appellants-appellees in this action at 29-27 41st Avenue, Long Island City, New York 11101, the address designated by said attorneys for that purpose by depositing a true copy of same enclosed in a postpaid, properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.


PAULA REZZONICO

Sworn to before me this

14th day of October, 1977.


WILLIAM M. RIFKIN
Notary Public, State of New York
No. 60-4624823
Qualified in Westchester County
Term Expires March 30, 1978

